Supreme Court, U.S.
FILED
JUL 16 1997
CLERK

(2)

No. 96-2015

In The

Supreme Court of the United States

October Term, 1996

FIDELITY TECHNOLOGIES CORPORATION,

Petitioner,

v.

LONNIE B. BUTLER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Third Circuit Court Of Appeal

BRIEF IN OPPOSITION

Submitted By:

ROBERT J. TÊTE – #17384
JONES, TÊTE, NOLEN, HANCHEY, SWIFT, SPEARS & FONTI, L.L.P.
1135 Lakeshore Drive
Post Office Box 910
Lake Charles, LA 70602
(318) 439-8315

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 l PP

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

PROCEEDINGS BELOW 1

STATEMENT OF FACTS 3

REASONS FOR DENYING THE WRIT 4

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Allen v. Pennco Engineering Co., 847 F.Supp. 1315 (M.D. La. 1994) 7

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L. Ed. 2d 206 (1985) 21

Barron v. Reich, 13 F.3d 1370 (9th Cir. 1994) 18

Berteau v. Wiener Corp., 362 So.2d 806 (La. App. 4th Cir. 1978) 5

Brown v. Luk, Inc., 1996 W.L. 280831 (N.D.N.Y. 1996) 16, 20

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S.Ct. 2608, 120 L. Ed. 2d 407 (1992) 7

Danielsen v. Burnside-Ott Aviation Training Center, 941 F.2d 1220 (D.C. Cir. 1991) 18, 19

Elliott v. General Gas Corporation, 85 So.2d 55 (La. 1955) 7

Foster v. Parker Transfer Co., 528 F.Supp. 906 (W.D.Penn. 1981) 16, 18

Francis v. Morial, 455 So.2d 1168 (La. 1984) 6

Hendrix v. Delta Air Lines, Inc., 234 So.2d 93 (La. App. 4th Cir. 1970) 22

La. Associated Gen. Contr. v. Calcasieu, 586 So.2d 1354 (La. 1991) 6

Lee v. Katz and Bestoff, Inc., 479 So.2d 459 (La. App. 1st Cir. 1985) 5

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 100 L. Ed. 2d 410 (1988) 21

TABLE OF AUTHORITIES – Continued

Page

Livadas v. Bradshaw, 512 U.S. 107, 114 S.Ct. 2068, 129 L. Ed. 2d 93 (1994) 21, 22

Masters v. Maryland Management Company, 493 F.2d 1329 (4th Cir. 1974) 20

Moore v. RLCC Technologies, Inc., 668 So.2d 1135 (La. 1996) 6

Nichols v. Mower's News Services, Inc., 492 F.Supp. 258 (D.Ver. 1980) 18

Potvin v. Wright's Sound Gallery, Inc., 568 So.2d 623 (La. App. 2nd Cir. 1990) 5

Ruby v. City of Shreveport, 427 So.2d 1267 (La. App. 2nd Cir. 1983) 6

Stafford v. City of Baton Rouge, 403 So.2d 733 (La. 1981) 5, 6

Stell v. Caylor, 223 So.2d 423 (La. App. 3rd Cir. 1969) 5

Universities Research Ass'n v. Coutu, 101 S.Ct. 1451, 450 U.S. 754, 67 L. Ed. 2d 662 (1981) 11, 13

Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476, 501 U.S. 597, 115 L. Ed. 2d 532 (1991) 7

STATUTES AND REGULATIONS

18 U.S.C. §§ 1961-1968 (RICO) 19

28 U.S.C. § 185(a) 21

29 U.S.C. § 201 (Fair Labor Standards Act) ... 16, 20, 22

29 C.F.R. § 4.191 15

TABLE OF AUTHORITIES – Continued

Page

40 U.S.C. §§ 327-33 (Contract Work Hours and Safety Standards Acts)..... 20

41 U.S.C. § 351(a) (Service Contract Act)..... 8, 11, 23

LSA-R.S. 23:631 and 632..... 2, 4, 5, 6, 23, 24

STATEMENT OF THE CASE

PROCEEDINGS BELOW

On behalf of LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, HAROLD D. STAPLES, and RUBY LEA HUTSON, counsel instituted this lawsuit on or about December 8, 1994. (App. 1-5). As alleged, Fidelity Technologies Corporation (hereinafter sometimes referred to as "Fidelity Technologies" or "petitioner"), failed to pay vacation benefits due former employees within seventy-two hours of their termination on November 5, 1992, notwithstanding amicable demand for same. In fact, Fidelity Technologies admitted in the district court proceedings that no amount was ever tendered to respondents until months after this suit was filed, years after the debt was due. (App. 23-24). The ostensible reason for the failure to tender amounts due was because the former employer was in a dispute with another company regarding which company would pay respondents the accrued benefits – the employer who terminated the employees, Fidelity Technologies, Inc., or the company to whom Fidelity assigned a contract, Dynamic Concepts, Inc. (App. 19).

Petitioner filed an exception to the subject matter jurisdiction contending, as the company president stated on the witness stand, that the United States Department of Labor was the only entity that could "legally force us" to pay. (App. 20). On February 23, 1996, a hearing on the

exception to the subject matter jurisdiction of the state court was heard. The district judge sustained the exception. An appeal ensued. On December 26, 1996, the Third Circuit Court of Appeal, reversed the trial court ruling holding that state court has jurisdiction to address respondents' claims asserted pursuant to state wage laws that require an employer to pay wages, including wage benefits, within seventy-two hours of termination. As the Third Circuit stated:

> "The purpose of LSA-R.S. 23:631 and 632 is to compel the employer to pay the earned wages of an employee promptly after his dismissal or resignation. In contrast, the SCA's purpose and objective is to ensure that federal service contract employees are treated equally with employees in that locality by requiring the contractor to pay the prevailing wage and benefits. La.R.S. 23:631 and 632 do not prevent or interfere with the attainment of these federal goals. In fact, 23:631 and 632 help to effectuate the SCA. Depriving Louisiana employees of this remedy would be inconsistent with the objectives of the SCA when the SCA seeks to ensure that these same employees are guaranteed the same benefits as other employees in the same locality and state. As such we find that the SCA does not preempt La.R.S. 23:631 and 632 and reverse the judgment of the trial court."

The Louisiana Supreme Court voted unanimously to deny petitioner's writ application.

STATEMENT OF FACTS

The sixteen respondents are all former employees of Fidelity Technologies whose employment with the petitioner was terminated on or about November 5, 1992. On November 1, 1992, a novation agreement dated October 30, 1992, between petitioner and Dynamic Concepts, Inc. went into effect whereby Dynamic Concepts, Inc. assumed the obligation to operate and maintain the administrative telephone system located at Fort Polk previously operated by Fidelity Technologies Corporation. The respondents were not paid their accrued vacation benefits upon termination. Mr. Gulati, President of Fidelity Technologies, testified on direct examination as follows:

> Q. "Did you have dispute develop over who owed vacation pay to the people that had been employed by you but began working for D.C.I. at the novation?"
>
> A. "Yes, we did."
>
> Q. "What was the dispute about?"
>
> A. Dispute was which of our companies was responsible for paying the vacation pay which was accrued before the novation transfer. (App. 19).

Counsel for respondents strenuously objected to the trial court allowing parol testimony about the substance of any purported "ruling" by the Department of Labor on the grounds that such "ruling" itself would be the best evidence of its content; that such testimony was hearsay and that it also lacked an adequate foundation. In any event, the dispute before the court was the dispute

between the petitioner and its former employees, not the dispute between Fidelity and Dynamic Concepts.

The petitioner chose to shirk its employment obligation until such time as an extraneous dispute with another party could be resolved. Mr. Gulati testified that, by pure happenstance, a "ruling" on the Fidelity/ Dynamic dispute occurred within a few days after service of the lawsuit now before this court. (App. 22). This suit was filed more than two years after the obligation of petitioner to pay the benefits arose. Not until three months after the Department of Labor "ruling" did Fidelity tender any monies at all, which tender did not include interest, penalties, or attorney fees. (App. 23-24).

REASONS FOR DENYING THE WRIT

I. Whether Louisiana courts retain subject matter jurisdiction over state wage law claims asserted pursuant to LSA-R.S. 23:631 and 632 in light of the presumption that such laws are not preempted by federal legislation.

After the passage of more than two years without receiving the vacation benefits to which respondents were entitled upon termination of employment, respondents filed this lawsuit in state court asserting the rights and remedies afforded by state law under LSA-R.S. 23:631 and 632. LSA-R.S. 23:631 provides in pertinent part:

> "Upon the discharge of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or

> other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, not later than three days following the date of discharge."

LSA-R.S. 23:632 provides in pertinent part:

> "Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making first demand following discharge or resignation."

With only minor modifications, these wage statutes have been the law in Louisiana since 1920. Louisiana courts have held that vacation benefits are considered an "amount . . . due under the terms of employment" within the meaning of these wage statutes. *Stell v. Caylor,* 223 So.2d 423, 426 (La. App. 3rd Cir. 1969). See also *Berteau v. Wiener Corp.,* 362 So.2d 806 (La. App. 4th Cir. 1978); *Lee v. Katz and Bestoff, Inc.,* 479 So.2d 459 (La. App. 1st Cir. 1985); *Potvin v. Wright's Sound Gallery, Inc.,* 568 So.2d 623 (La. App. 2nd Cir. 1990)

In *Stafford v. City of Baton Rouge,* 403 So.2d 733, 734 (La. 1981), the Louisiana Supreme Court held that

" . . . the requirements of R.S. 23:631, *et seq.*, pertaining to the duty of an employer to pay wages due to an employee upon discharge or resignation . . . apply equally to both private and governmental employers." The Court further stated:

> "The employees of governmental agencies need their wages upon cessation of employment just as urgently as the employees of individuals or of private corporations. Furthermore, the Legislature, although expressly recognizing this special need of all employees to receive wages due him immediately upon discharge or termination, has not seen fit to distinguish between governmental and private employers in imposing the obligation upon employers to pay immediately the wages due upon cessation of employment. We decline to imply that the Legislature intended such a distinction, and we have not been shown any rational basis for a constitutional classification if the Legislature did intend to distinguish between employers." *Stafford*, 403 So.2d at 734

It is axiomatic that states have the right to adopt such wage laws in the exercise of their police power, that is, " . . . the inherent power of the state to govern persons and things, within constitutional limits, for the promotion of general security, health, morals and welfare." *Francis v. Morial*, 455 So.2d 1168, 1172 (La. 1984); *La. Associated Gen. Contr. v. Calcasieu*, 586 So.2d 1354, 1366 (La. 1991); *Moore v. RLCC Technologies, Inc.*, 668 So.2d 1135, 1143 at note 11 (La. 1996); *Ruby v. City of Shreveport*, 427 So.2d 1267, 1271 (La. App. 2d Cir. 1983). These particular state laws were first enacted because of " . . . an evil practice then

prevailing among some employers of forcing a discharged laborer to wait until pay day, or longer, to receive the wages he had earned." *Elliott v. General Gas Corporation*, 85 So.2d 55, 57 (La. 1955)

In analyzing whether the state wage laws, adopted to protect Louisiana workers, are preempted by federal law, Courts must start first with the presumption that " . . . the historic police powers of the states [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Allen v. Pennco Engineering Co.*, 847 F.Supp. 1315, 1318 (M.D. La. 1994) quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992). The court in the *Allen* case succinctly summarizes the only instances in which state law is preempted under the Supremacy Clause of the United States Constitution as follows:

> "Courts recognize three circumstances in which state law is preempted under the Supremacy Clause. A federal statute may contain a provision which states that it expressly supersedes state authority. In the absence of such explicit language, state law may be displaced when Congressional regulation is so comprehensive that it is said to have completely occupied an entire field, leaving no room for state law. Preemption may also occur when and to the 'extent that state and federal law actually conflict'." *Allen*, 847 F.Supp. at 1318, citing *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 605, 115 L. Ed. 2d 532, 111 S.Ct. 2476.

It is within this legal framework, that the Third Circuit, Court of Appeal considered and rejected the contention that state law is wholly preempted by the Service Contract Act.

II. Whether the presumption against preemption of a state law, enacted for the welfare of state citizens pursuant to the state's police power, is overcome by any express provision in the Service Contract Act of 1965.

The SCA provides that:

> "[e]very contract . . . entered into by the United States . . . in excess of $2,500 . . . the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain . . . (1) A provision specifying the minimum monetary wages to be paid the various classes of service employees . . . as determined by the Secretary . . . in accordance with the rates for such employees in the locality. . . . (2) A provision specifying the fringe benefits to be furnished the various classes of service employees as determined by the Secretary [including] vacation and holiday pay . . . ". 41 U.S.C.A. § 351(a)

Reference to the Service Contract Act, 41 U.S.C. 351 *et seq.* will show that there is no express provision stating that this federal law supersedes state law regulation of the employment relationship. Therefore, the present case may readily be focused more narrowly on whether a conflict between federal and state law exists requiring displacement of state law, or whether the Congressional

regulation is so comprehensive that it completely occupies the entire field leaving no room for state law. To consider these issues, the Third Circuit, Court of Appeal, correctly considered not only the purpose of the state laws, as stated above, but also the purpose of the federal legislation which petitioner would apply.

III. The purpose for which the Service Contract Act of 1965 was enacted was to assure that employees working for a private contractor performing work for the federal government were paid the prevailing wage rate in the locality of the work.

The Service Contract Act is, in short, a prevailing rate wage law. The reason for the Act is stated in the Legislative History as follows:

> The need for this legislation is well stated in the report issued by the House Education and Labor Committee on September 1, 1965 (H.Rept.No. 948), as follows:
>
> > Many of the employees performing work on Federal service contracts are poorly paid. The work is generally manual work and in addition to craftwork, may be semiskilled or unskilled. Types of service contracts which the bill covers are varied and include laundry and drycleaning, custodial and janitorial, guard service, packing and crating, food service, and miscellaneous housekeeping services.
> >
> > Service employees in many instances are not covered by the Fair Labor Standards Act or State minimum wage laws. The counterpart of these employees in Federal service,

blue-collar workers, are by a Presidential directive assured of at least the Fair Labor Standards Act minimum. Bureau of Labor Statistics surveys of average earnings in service occupations in selected areas in 1961 and 1962 show, however, that an extremely depressed wage level may prevail in private service employment. In contract cleaning services, for example, in some areas less than $1.05 an hour was paid. Elevator operators earned low rates, varying from $0.79 to $1.17 an hour. Service contract employees are often not members of unions. They are one of the most disadvantaged groups of our workers and little hope exists for an improvement of their position without some positive action to raise their wage levels.

The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level. When a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages.

As the historical and statutory notes of the SCA state:

> "The purpose of this bill is to provide labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies. The service contract is the only remaining category of Federal contracts to which no labor standards protection applies. Federal construction contracts require compliance with labor standards under the Davis-Bacon Act and related statutes. Federal supply contracts also provide labor standards under the Walsh-Healy Public Contracts Act."
>
> * * *
>
> "Persons covered by the bill must be paid no less than the prevailing rate in the locality as determined by the Secretary, including fringe benefits as an element of the wages. . . . In determining the prevailing rate in the locality, the Secretary will consider the compensation paid persons engaged in such service-work and work of a similar type in the locality." See Historical and Statutory Notes 1965 Act 41 U.S.C.A. § 351.

This legislative history indicates that Congress enacted this legislation for the very same reasons Congress had previously enacted legislation relating to federal construction contracts, namely, to assure a prevailing wage rate. In *Universities Research Ass'n v. Coutu*, 101 S.Ct. 1451, 1463, 450 U.S. 754, 773, 67 L. Ed. 2d 662 (1981), this Honorable Court extensively reviews the legislative history of the Davis-Bacon Act and states as follows:

"[T]he Davis-Bacon Act . . . was 'designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.' [citations omitted] Passage of the Act was spurred by the economic conditions of the early 1930s, which gave rise to an oversupply of labor and increased the importance of federal building programs, since private construction was limited. [citations omitted] In the words of Representative Bacon, the Act was intended to combat the practice of 'certain itinerant irresponsible contractors, with itinerant, cheap, bootleg labor, [who] have been going around throughout the country "picking" off a contract here and a contract there.' The purpose of the bill was 'simply to give local labor and the local contractor a fair opportunity to participate in this building program.' 74 Cong.Rec. 6510 (1931).

As originally enacted . . . the Act required that every federal contract in excess of $5,000 in amount for 'construction, alteration, and/or repair of any public buildings' contain a provision stating that the rate of wages paid laborers and mechanics would not be less than the prevailing rate for similar work in the locality; the Act further required that every contract contain a provision stating that disputes as to what the prevailing wage was on any given project were to be conclusively determined by the Secretary if the contracting officer was unable to resolve the controversy. The original Act thus did not provide for predetermination of prevailing wages by the Secretary; it also did not establish any enforcement mechanism.

> Congress soon concluded, however, that the Act as originally drafted was inadequate. Discontent focused on the lack of effective enforcement provisions and the 'postdetermination' of the prevailing wage. [citations omitted] Contractors called for predetermination of prevailing wages, claiming that they had been put to unexpected expense by postcontract determinations that the prevailing wage was higher than the rate upon which they had based their bids. [citations omitted] While the labor movement was divided on this issue, most of the national leadership opposed predetermination. [citations omitted] Labor was united, however, in calling for the establishment of an enforcement mechanism. [citations omitted]
>
> * * *
>
> [I]n 1935, Congress succeeded in adding the predetermination and enforcement provisions found in the current statute. Act of Aug. 30, 1935, 49 Stat. 1011." *Universities Research Ass'n* at 1463-1464.

In view of the legislative history of the Service Contract Act and the Davis-Bacon Act, after which the SCA was modeled, respondents posed this question in the proceedings below – to what extent, if any, does application of state law in the instant case conflict with the Service Contract Act? For the reasons assigned by the Third Circuit, and the reasons set forth below, it is respectfully submitted that the Third Circuit correctly held that there was no conflict.

IV. Absent an express statement by Congress, pre-empting state law, to what extent, if any, does the assertion of a state law claim seeking payment of monies owed pursuant to an employment contract conflict with the Service Contract Act of 1965 or the purpose for which it was enacted?

Respondents have not contended that there has been any violation of the SCA by Fidelity Technologies Corporation. In fact, reference to the benefits outline issued by Fidelity Technologies Corporation to its employees will show that petitioner adopted the vacation pay required by federal law. (App. 18). This agreement between Fidelity and its employees provides in part:

> **"D. Vacation and Holiday Pay:**
>
> This policy is as established in the Fringe Benefit statement of the applicable wage determination."

The applicable wage determination is attached to the contract between Fidelity Technologies Corporation and the Seventh Signal Command. (App. 31) The applicable wage determination states that employees are entitled to the following:

> "2 weeks paid vacation after one year of service with the contractor or successor; 3 weeks after ten years of service." (App. 18)

In short, by incorporating by reference the applicable wage determination, petitioner complied with the applicable federal law designed to protect an employee from entering into an employment contract that pays less than the prevailing wages and benefits.

Where an employer hires an employee at a wage below that required by federal law, federal law provides the employee with an administrative remedy whereby the employee can seek to be paid the difference between what the parties to the employment contract had agreed upon and the actual amount to which the employee was entitled by virtue of federal law. 29 C.F.R. § 4.191. The underlying claim for which the administrative remedy is afforded is one where the employer has violated the SCA by entering an employment contract paying less than required by federal law.[1] On the other hand, the underlying right upon which respondents' suit is based is the right to payment of earned monies upon termination of employment.

The purpose of the Service Contract Act, and the purpose of the state wage laws are quite distinct from one another. To suggest a conflict between these statutes would be tantamount to an argument that the federal minimum wage law and the state statutes applicable in this case conflict with one another because the former law is intended to assure that an employer hires employees at a certain minimum wage level and the latter state law intended to assure that the employer actually pays those wages to which the employer agreed upon cessation of the employment relationship.

---

[1] Prior to retention of counsel, respondents who had not yet grasped the distinction between a claim for non-payment of wages upon termination which may be brought under state law, and a claim arising out of payment of substandard wages, in fact, filed a claim for administrative relief. However, as Mr. Savant testified, the former employees never received any response from the complaint. (App. 25-26)

The lack of a conflict between the Service Conflict Act and application of Louisiana law in the instant case may be best demonstrated through contrasting one of the cases relied upon by petitioner and the present case. In *Foster v. Parker Transfer Company*, 528 F.Supp. 906 (W.D.Penn. 1981), defendant's employees, who were not paid the wage rate provided in the SCA, filed a private lawsuit against the employer to recoup wages. As the court stated, "[respondents] simply allege that these wages did not meet the levels set by the Secretary of Labor under the Service Contract Labor Standards Act." *Foster*, 528 F.Supp. at 907. In that case, the recourse provided to the employees was through the Secretary of Labor. That court expressly noted that there was no allegation that the wages paid fell below those required by the Federal Labor Standards Act, 29 U.S.C. § 201 *et seq.* Although no precise figures are stated in that case, the employees were seeking the difference between the actual wages that their employer had agreed to pay, and the actual wages required by the wage determination by Secretary of Labor pursuant to the SCA. Quite correctly, the court held that the Secretary of Labor was the authority vested with the power to enforce payment of the "prevailing labor rates". *Foster*, 528 F.Supp. at 907. The court was not called upon to decide an instance where the agreed wages were even less than minimum wage, and the implication of the case is that in such instances other remedies may be available.[2]

---

[2] In fact, where federal laws other than the SCA have been violated, courts have considered these federal laws supplemental to the SCA. See *Brown v. Luk, Inc.*, infra.

In the present case, respondents have not contended that their former employer had agreed to pay them anything more or less than that required by the wage determination of the Secretary of Labor. The wrong for which respondents have sought judicial intervention is that Fidelity Technologies Corporation did not fulfill its employment obligation existing by virtue of the employment contract existing between respondents and petitioner, as evidenced by the employee benefit outline. (App. 8-18). As the president of Fidelity admitted, the dispute was not as to the amount, but as to the entity who owed the monies, Fidelity or the company to whom the Fidelity assigned its contract, Dynamic Concepts. (App. 19).

Respondents agree that the Secretary of Labor has jurisdiction over a prevailing wage rate dispute. However, this is not the dispute in this case. The Third Circuit, Court of Appeal, correctly held that state courts retain jurisdiction to require payment of wages upon termination of the employment relationship within seventy-two hours of same and the power to impose penalties and attorney fees upon an employer who fails to comply with this state law.

V. Whether the Service Contract Act of 1965 is so comprehensive that it leaves no room for state law.

The only other basis for denying the jurisdiction of the state court to protect the rights of these Louisiana

citizens is if Congressional legislation is so comprehensive that it is said to have completely occupied an entire field.[3]

Petitioner cited to the lower courts and to this Honorable Court a number of cases to support the proposition that a service contract employee has no private cause of action under the Service Contract Act; therefore, the service contract employee has no private cause of action. *Danielsen v. Burnside-Ott Aviation Training Center*, 941 F.2d 1220 (D.C. Cir. 1991); *Foster v. Parker Transfer Co.*, 528 F.Supp. 906 (W.D.Penn. 1981); *Nichols v. Mower's News Service, Inc.*, 492 F.Supp. 258 (D.Ver. 1980); *Barron v. Reich*, 13 F.3d 1370 (9th Cir. 1994). Petitioner's argument begs the question of whether state law is wholly preempted. These cases were simply declining to fashion **from** the Service Contract Act, **itself**, a federal common law private remedy for service contract employees. In other words, the courts were declining to infer from the SCA that service contract employees could enforce their SCA right to the prevailing wage rate by a mechanism other than the administrative procedure established for disputes arising out of contractors paying less than the prevailing wage rate.

---

[3] Respondents submit that the reason that the Department of Labor never acted upon the complaint filed by respondents subsequent to their termination of employment was that the dispute is simply not one in which the Secretary of Labor was interested since the matter did not involve a prevailing wage rate dispute. The fact that the Secretary of Labor never responded to the complaint hardly militates toward showing that Congressional regulation has completely occupied the entire field.

In the *Danielsen* case, relied upon by the petitioner, respondents were faced with the situation where the right to the prevailing wage rate was being circumvented by a misclassification of employees that deprived workers of the wage rate determined by the Secretary of Labor. That dispute, of course, is one to be resolved by the Secretary of Labor, and the court quite correctly held that no private cause of action could be asserted to enforce that SCA right. As the *Danielsen* court stated: "Congress provided the statutory right for a limited and governmental cause of action for underpayment." *Danielsen*, 941 F.2d at 1227. Congress, having created the right, also provided the remedy. Respondents in the instant case, however, are not asserting a cause of action for a failure to pay the prevailing wage rate, but a distinct, separate and independent claim to be paid, upon termination, that which the employer actually agreed to pay. Respondents' cause of action arises from a state statutory right, with a state statutory remedy.

The *Danielsen* court was only required to decide and only decided whether "the SCA gives rise to a private civil action under RICO"[4] where the crux of the dispute was whether or not some employee jobs had been improperly classified under the contract so as to reduce their wages to an amount below the prevailing wage rate for the work under the proper classification. *Danielsen*, 941 F.2d at 1227.

---

[4] Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968.

If Fidelity Technologies Corporation had breached the Service Contract Act by not incorporating into the employment contract the requirements of the Service Contract Act, then this case would be one of whether a federal statutory right had been violated. Once, however, Fidelity Technologies Corporation agreed to pay the prevailing wage rate, including fringe benefits, these employees became vested with that contractual right, and the Louisiana statutory laws that protect such contractual rights are not preempted by any federal law.

In a recent case, decided since the trial court ruling, *Brown v. Luk, Inc.*, 1996 W.L. 280831 (N.D.N.Y. 1996) the court expressly recognized that the Service Contract Act, Contract Work Hours and Safety Standards Act ("CWHSSA") 40 U.S.C. §§ 327-33, and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 " . . . are in fact mutually supplemental which means that 'none of the three statutes are mutually exclusive of the other, [and] the provisions of all may apply so far as they are not in conflict.' " *Brown v. Luk, Inc.*, supra, quoting *Masters v. Maryland Management Company*, 493 F.2d 1329, 1332 (4th Cir. 1974). If the rights and remedies under the CWHSSA and FLSA are supplemental to the SCA, then a state statutory right and remedy may also be supplemental.

By the terms of the employee benefits outline, Fidelity Technologies Corporation agreed to pay whatever vacation pay was set forth in the applicable wage determination, namely two weeks per year after one year of service, and three weeks per year after ten years of service. (App. 18; 31) The mere fact that one must refer to a document that must be interpreted according to federal

law in order to compute the amount due each employee does not warrant preemption. That issue has been addressed by this Honorable Court in *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 129 L. Ed. 2d 93 (1994). In *Livadas*, the plaintiff sought to recover from her former employer under state law, wages due upon discharge, together with penalties for failure to tender same. The California Commissioner of Labor, vested with the authority to hear such state law claims, responded that the plaintiff was barred from enforcing any such state law claim because the plaintiff's employment was governed by a collective-bargaining agreement and therefore Section 301 of the Labor Management Relations Act, 28 U.S.C. § 185(a), precluded the state from allowing the assertion of state law remedy. This Court, however, disagreed, citing previous holdings where the Court had underscored the point:

> "[t]hat Section 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and we stressed that it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement, *Lueck, supra*, 471 U.S., at 213, 105 S.Ct., at 1912 (and not whether a grievance arising from 'precisely the same set of facts' could be pursued, *Lingle, supra*, 486 U.S., at 410, 108 S.Ct., at 1883) that decides whether a state cause of action may go forward. Finally, we were clear that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished, see *Lingle*, 486 U.S., at 413, n. 12, 108

> S.Ct., at 1885, n. 12 ('A collective-bargaining agreement may, of course, contain information such as rate of pay . . . that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled')." *Livadas*, 114 S.Ct. at 2078.

As in the *Livadas* case, the primary text to which a court must look to decide whether respondents are entitled to unpaid benefits together with legal interest, penalties and attorney fees is not a contract, but rather a calendar. *Livadas*, 114 S.Ct. at 2079. Since the only reason, in the present case, that a state court will even need to refer to the contract between Fidelity Technologies Corp. and the Seventh Signal Command is to compute the damages due respondents, it can hardly be stated that such a tangential relation bars respondents from seeking recourse in state court.

In *Hendrix v. Delta Air Lines, Inc.*, 234 So.2d 93 (La. App. 4th Cir. 1970), writ denied 236 So.2d 498, the court was called to decide whether federal law, in particular the Federal Labor Standards Act, 29 U.S.C.A. § 201 *et seq.*, preempted these same Louisiana wage statutes, relied upon by respondents. The court held:

> "[F]ederal law makes no provision for or against penalties for mere failure to pay admittedly due *agreed-upon* wages promptly upon termination of employment. We conclude there is no preemption on this question by the Fair Labor Standards Act, 29 U.S.C.A. § 201 *et seq.*" *Hendrix*, 234 So.2d at 95.

Respondents respectfully submit to this Honorable Court that the same result is warranted in this case in view of

the facts and in light of the law. Petitioner's writ of certiorari should be denied.

CONCLUSION

Respondents filed suit against its former employer, Fidelity Technologies Corporation, because more than two years lapsed after their termination and after respondents had first made amicable demand for their accrued vacation benefits, and still their former employer had not paid them. The suit was filed pursuant to LSA-R.S. 23:631 and 632, seeking the wage benefits, interest, penalties, and attorney fees that are rightfully imposed upon an employer who shirks its responsibilities to former employees whose services are no longer required by failing to pay what even the employer now, belatedly, admits was due and owing at termination.

Throughout these proceedings on petitioner's exception to the jurisdiction of state court, petitioner has sought to divert attention from addressing the issue, squarely addressed by the Third Circuit, Court of Appeal, namely, whether state law is preempted, by espousing a fallacious argument, employing circular reasoning, that respondents are claiming that petitioner violated the Service Contract Act, 41 U.S.C. 351 *et seq.* ("SCA"), and that the SCA provides the exclusive remedy for an SCA violation. Respondents have not asserted a claim under the SCA which is a prevailing wage rate law that allows underpaid employees, i.e., employees paid less than the prevailing wage rate, to be compensated at the prevailing

wage. Respondents have sought unpaid wage benefits due upon termination from employment.

Louisiana wage laws are a legitimate exercise of the state's police powers intended to promote the general security of its citizens, and no court has ever held that such state laws are preempted by the SCA, legislation enacted to serve an entirely different purpose. The SCA is designed to assure that a prevailing wage rate is paid. LSA-R.S. 23:631 and 632 are intended to protect employees from employers who do not pay earned wages or wage benefits upon termination.

If Congress had intended the Service Contract Act to preempt any and all state law causes of action relating to non-payment of wages, the legislative branch could have expressly stated such in the Act. There is no such provision in the SCA, and the legislative history of the Act suggests the reason there is no such provision is because Congress was enacting legislation to address a particular concern, namely, that workers may be paid substandard wages. The created federal right to the prevailing wage rate is protected by a federal remedy; however, the right to payment of earned wages, including benefits, upon termination of employment remains a state concern protected by state law. State law does not conflict with federal law on this point.

Without delving deeply into the mindset of a corporation that would think, even for a moment, that it could make its own employees wait for payment until such time as the company resolved its differences with a third party, that very thought evidences that this is not an area where Congressional legislation is so comprehensive as to leave

no room for state law. Respondents have been denied long enough full recourse against their former employer. Respondents urge this Honorable Court to deny petitioner's writ application.

Respectfully submitted,

JONES, TÊTE, NOLEN, HANCHEY, SWIFT, SPEARS & FONTI, L.L.P.
1135 Lakeshore Drive
Post Office Box 910
Lake Charles, LA 70602
(318) 439-8315

ROBERT J. TÊTE – #17384

Attorneys for Respondents

July 16, 1997

LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, AND HAROLD D. STAPLES	: 30TH JUDICIAL : DISTRICT COURT
VS. NO. 55876	: PARISH OF VERNON
FIDELITY TECHNOLOGIES CORPORATION	: STATE OF LOUISIANA
FILED: _____	: _____ DEPUTY CLERK

PETITION FOR DAMAGES

(Filed Dec. 8, 1994)

NOW INTO COURT, through undersigned counsel, comes plaintiffs, LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, AND HAROLD STAPLES, all persons of the full age of majority and residents of Vernon Parish, State of Louisiana, appearing herein individually, who with respect represents:

1.

Defendant, Fidelity Technologies Corporation is a foreign corporation which was engaged at all times material herein in business in the State of Louisiana, at Fort Polk, Vernon Parish, where it provided maintenance and installation of telephone services.

2.

The named plaintiffs were at all times material herein employed by Fidelity Technologies Corporation at Fort Polk.

3.

On or about November 5, 1992, defendant terminated plaintiffs.

4.

Thereafter, the terminated plaintiffs made timely demand to be paid all wages including vacation benefits and other fringe benefits owed by defendant to the plaintiffs.

5.

Defendant failed to pay the vacation benefits and other benefits owed to the terminated plaintiffs within 72 hours of the date of termination and, continuing to date, have not made said payments.

6.

As a result of its actions described in paragraph 5 above, the plaintiffs have been damaged and are entitled to be made whole by relief, including but not limited to:

(a) all wages and benefits owed but not yet paid;

(b) penalty wages as provided by LSA-R.S. 23:632;

(c) legal interest on all of the above amounts;

(e) for all costs of these proceedings; and

(f) reasonable attorney fees.

7.

No individual's claim in this matter is in excess of $20,000 exclusive of legal interest and costs.

WHEREFORE, plaintiffs respectfully request and pray that after due proceedings had, the Court provide the relief specified in paragraph 6 above, along with legal interest and for all general and equitable relief.

JONES, TÊTE, NOLEN,
HANCHEY, SWIFT & SPEARS
Post Office Box 910
Lake Charles, LA 70602
(318) 439-8315

BY: /s/ Edward J. Fonti
EDWARD J. FONTI
BAR ROLL NO. 5676

LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, AND HAROLD D. STAPLES	: 30TH JUDICIAL : DISTRICT COURT
VS. NO. 55,876 A	: PARISH OF VERNON
FIDELITY TECHNOLOGIES CORPORATION	: STATE OF LOUISIANA
FILED: _____	: _____ DEPUTY CLERK

AMENDED PETITION FOR DAMAGES

(Filed Dec. 29, 1994)

NOW INTO COURT, through undersigned counsel, comes plaintiffs, LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, AND HAROLD STAPLES, who amends the petition in the following respects:

1.

To add Ruby Lea Hutson as a plaintiff.

WHEREFORE, plaintiffs respectfully request and pray that after due proceedings had, the Court add RUBY LEA HUTSON as a plaintiff to this lawsuit.

JONES, TÊTE, NOLEN,
HANCHEY, SWIFT & SPEARS
Post Office Box 910
Lake Charles, LA 70602
(318) 439-8315

BY: /s/ Edward J. Fonti
EDWARD J. FONTI
BAR ROLL NO. 5676

LONNIE B. BUTLER,	: NUMBER 55,876A
AUDREY M. ANDERSON,	:
ROBERT H. ARMER, W. L.	:
BASCO, JR., LINDA KAY	:
BEHAN, JAMES W.	:
BRYANT, LOYIL W. CRYER,	:
WAYNE DUNN, KARAN M.	:
MAHLEN, JOSEPH T.	: 30TH JUDICIAL
MARTIN, MARGARET H.	: DISTRICT COURT
MAYO, FRANCES R.	:
MELCHIORRI, DONALD R.	:
SAVANT, RAMONA SMART,	:
AND HAROLD D. STAPLES	:
VERSUS	: —
	:
FIDELITY TECHNOLOGIES	: VERNON PARISH,
CORPORATION	: LOUISIANA

DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION

(Filed March 14, 1995)

NOW INTO COURT, through undersigned counsel, comes Fidelity Technologies, Inc., Defendant herein, and excepts to the jurisdiction of this Court on the grounds that this Court lacks subject matter jurisdiction over the claims asserted herein, because under the Services Contract Act of 1965, Plaintiffs, as service contract employees, have no private right of action for underpayment of wages or fringe benefits, including vacation pay, and their sole remedy is to seek relief by application with the

Secretary of Labor, relief which has in fact been sought and obtained.

Respectfully submitted,

WIENER, WEISS, MADISON
& HOWELL
A Professional Corporation

By: /s/ James R Madison
James R. Madison
BR #8835
333 Texas Street,
Suite 2350
P. O. Box 21990
Shreveport, Louisiana
71120-1990
(318) 226-9100

ATTORNEYS FOR DEFENDANT,
FIDELITY TECHNOLOGIES, INC.

JOINT EXHIBIT 6

FIDELITY TECHNOLOGIES CORPORATION
PROPOSED
OUTLINE OF BENEFITS
(Filed Feb. 23, 1996)

Fidelity Technologies Corporation Employee Benefits Plan:

Following is an outline of benefits under your employer sponsored health plan.

Calendar Year Deductible:

$100 per person
$200 per family

No deductible is applied to Accident Expenses incurred within 90 days of an accident.

Out-of-Pocket Maximum

After deductible, the plan pays 90% of the next $10,000 of expenses, 100% thereafter.

Per person calendar year maximum	$1,000
Per family	$2,000

Dollar Benefits

The following benefits will be paid at 100%, no deductible or co-insurance.

Pre-Admission Testing Expenses
Home Health Care Expenses
Ambulatory Surgical Center Charges
Birthing Center Expenses
Extended Care Charges

Second Surgical Opinion
Supplemental Accident Benefits

Covered Expenses

The following is a partial list of charges that will be paid subject to deductible and co-insurance (90%).

Hospital Expenses
Well Baby Care
Prescription
Surgeon – Anesthesia Charges
Durable Medical Equipment
X-ray and Laboratory
Radiation
Medical Supplies
Chemotherapy
Physiotherapy

Pre-Admission Certification

Pre-certification verifies the medical necessity of your planned hospital admission and monitors the number of days requested by your physician for your hospital stay.

Prior authorization is *required* for all non-emergency hospital admissions. Emergency admissions must be reported within 48 hours.

When your physician recommends that you or a covered family member enter a hospital, you or your physician must call National Benefits Managed Care Corporation, 1-800-999-5852, to initiate the pre-certification process. If certification is not received, a separate $100 deductible will apply to eligible benefits.

Specific Benefit Maximums

- Home Health Care Visits – 60 Visits Per Calendar Year.
- Extended Care and Rehabilitation Daily Room and Board. The plan covers the first 100 days of confinement. Confinement must start within 14 days of hospital stay and is limited to semi-private room rate.
- Hospice Care – The first $7,500 paid at 100%, the remaining charges subject to deductible and co-insurance.
- Private Nurses – Covered when medically necessary, in a recognized facility which cannot provide skilled nursing care or such care is authorized as part of a Home Health Care Plan. Plan pays 100% of visits each benefit year, up to four hours per visit.
- Birthing Center – Covered at 100% for room and board, anesthetics and charges for giving them and other services and supplies.
- Hospital Room & Board – Average semi-private room and board rate.
- Intensive Care – 3 times the average semi-private room and board rate.
- Inpatient Mental & Nervous/Substance and Alcohol Abuse – The plan pays for 60 days of confinement in a calendar year, subject to usual and customary charges.
- Outpatient Mental & Nervous/Substance and Alcohol Abuse – The plan will pay 50% of usual and customary charges up to $1,000 per calendar year.

- Pregnancy Coverage – medical expense benefits are payable for pregnancy-related expenses of employees on the same basis as for any other illness.
- Tempmandibur Joint Dysfunction (TMS) – The plan pays up to $2,500 lifetime maximum per insured.
- Infertility Testing. The Plan pays up to ~~$50,000~~ 25,000 lifetime maximum.
- Chiropractic Expense to a maximum of ~~$500~~ 1500 per calendar year.

General Exclusions

What the Health Plan Does Not Cover:

- Injury which happens during work at any job for pay.
- Sickness for which payment is made or available through workers' compensation or a similar law.
- Confinement in a United States government or agency hospital, unless you would have to pay for the expenses if you did not have coverage.
- Expenses you or your Dependent would not legally have to pay.
- Education, training, and bed and board while confined in an institution which is mainly a school or other institution for training, a place of rest, a place for the aged or a nursing home.
- Custodial care.

- Eyeglasses, eye refractions and hearing aid unless required by accidental injury which happens while covered.
- Charges incurred for any intentionally self-inflicted injury or sickness.
- Services of a person who resides in your home or is a member of your immediate family.
- Charges incurred prior to the date coverage is effective under the plan or after coverage is terminated.
- Charges incurred in connection with cosmetic surgery except to correct a condition resulting from an injury or to correct a congenital abnormality in a child born while the parent is covered.
- Charges for exogenous obesity, including any prescription drugs, nutrient supplements, surgery or other treatment.

FIDELITY TECHNOLOGIES CORPORATION

Corporate Headquarters:
2501 Kutztown Road
Reading, PA 19605
(215) 929-3330
FAX (215) 929-6861

EMPLOYEE BENEFITS OVERVIEW:

A. SAVINGS AND RETIREMENT PLAN (401k)

FIDELITY TECHNOLOGIES CORPORATION is offering a tax favored savings plan:

Who Can Join:

All full-time employees who have completed 3 months of service and attained the age of 18 are eligible to participate in the plan.

When Can You Join:

After meeting eligibility requirements, you will be able to join on any January 1st or July 1st.

How the Plan Works:

The basic operation of the Plan is simple:

- You contribute to the Plan through regular payroll deductions.
- Tax savings are added to your account
- You select from several plan options
- No taxes are paid on any earnings in your account until withdrawn.

How to Enroll:

To enroll, you complete and return an Enrollment Form that upon meeting eligibility requirements will be prepared for you indicating:

- the amount you want to contribute
- how you want your money applied
- The beneficiary to receive your account if you should die

Your membership in the Plan will begin with you first payroll deduction.

You Can Change Your Mind:

On any January 1st and/or July 1st you can

- adjust the amount of your contribution up or down
- change how your current contributions are applied
- transfer your account balance from one investment option to another
- suspend and resume your contributions.

Contributions:

There are several types of contributions to your account:

1. Your Contributions: you can contribute from 2% up to 15% of your total income from the Company.
2. Immediate Tax Savings: Each contribution saves you Federal Income Taxes, and possibly state and local taxes, depending on where you live or work. These savings are deposited into the Plan for you.
3. Tax-deferred Earnings: no taxes are paid on any earnings in the Plan until they are withdrawn.
4. Company Match: The plan will match the first 5% of your contribution at the rate of $.25 on the dollar.

   You are always 100% vested in your own contributions. Your vested interest in employer contributions is based on a schedule of 0%/20%/40%/60%/80%/100% (fully vested in 6 years.

You Select the Options:

There are various Plan options:

1. Income Account (currently yielding 8.10% interest – can increase or decrease based upon prevailing economic conditions).
2. Diversified Equity Fund (Stocks)
3. Life Insurance

Loans are available:

Loans can be made after one year's participation in the Plan.

Loans are only available from YOUR investments in the Fixed Income Account.

A minimum loan is $500.00. You can borrow up to 50% of your account to allocated maximums ($10,000.00 or $50,000.00 depending on account balance.)

All loans must be repaid with interest, within 5 years. As you repay the loan, all interest will be credited back into your account.

B. Medical Benefits Package:

Health Insurance coverage will be administered by National Benefits Corp.

Life Insurance at the rate of one time their annualized base rate (which will be doubled in the event of accidental death).

Short Term Disability which will pay a portion of your salary for the 1st day in the event of accident and the 8th day in the event of sickness and will continue for up to 90 days.

Long Term Disability will cover you if you are out or work for 90 days or more.

FIDELITY TECHNOLOGIES CORPORATION pays the premium to provide employees with individual coverage. Family coverage is provided with the additional premium being deducted from the employee's paycheck, in the amount of $ ___ per pay.

All new employees MUST be enrolled within 31 days of hire. An enrollment form should be completed and sent to Human Resources immediately upon an employee reporting to work to ensure the enrollment is done within the 31 day timeframe.

Any employee wishing to cover dependents should request insurance for his eligible dependents at the same time of his/her enrollment. If an employee has no eligible dependents initially, but acquires one at a later date, the employee should be enrolled for dependent coverage within 31 days from the date the dependent was acquired.

For further explanation of benefits covered, please refer to *Outline of Benefits* attached.

SHORT TERM DISABILITY:	**Accident**	**Sickness**
Benefit Waiting Period	0 Days	7 Consecutive days
Benefit Duration	13 Weeks	13 Weeks

Benefit calculation: The lesser of 60% of weekly basic earnings or $300.00 reduced by other applicable benefits.

Includes coverage for mental health and substance abuse. Benefits apply only to non-occupational sickness or accident. Maximum weekly benefit – $300.00.

Weekly benefits will end on the earliest of:

1. The date the employee is no longer disabled; or
2. The date the maximum benefit period shown above ends; or
3. The date the LTD benefits under this policy are payable; or
4. The date benefits become payable under any other group long-term disability policy sponsored by FIDELITY TECHNOLOGIES CORPORATION.

Weekly benefits for any week the employee works for wage or profit will be reduced by the amount earned from such work for that week.

LONG-TERM DISABILITY:

Benefit Waiting Period	90 Days
Benefit Duration	Age 65
Maximum Benefit	$3,000/month

Benefit calculation: The lesser of 60% of basic monthly earnings or $3,000/month reduced by amounts from full and other benefit sources.

C. Sick Leave/Personal Time:

Sick leave/personal time is provided as established in the Health and Welfare rate of the Wage Determination up to a maximum of five days per year.

D. **Vacation and Holiday Pay:**

This policy is as established in the Fringe Benefit statement of the applicable wage determination.

* * *

[p. 11] if he just asks an open ended question like that.

BY THE COURT:

Break it down, counsel, define your question more closely.

Q. Did you have a dispute develop over who owed vacation pay to the people that had been employed by you but began working for D.C.I. at the novation?

A. Yes, we did.

Q. What was the dispute about?

A. Dispute was which of our companies was responsible for paying the vacation pay which was accrued before the novation transfer. (EXACTLY AS STATED THROUGHOUT)

Q. And, were you and D.C.I. able to resolve that dispute?

A. No sir.

Q. When the – after the dispute remained unresolved what did you do to try to finalize or get a resolution of the matter, of the dispute?

A. Okay. Both of us jointly agreed that D.C.I. shall submit this to the agency which is responsible for resolving this kind of dispute, predominantly the Department of Labor, Wage and Hourly Division. (EXACTLY AS STATED THROUGHOUT)

Q. And, why did you believe that that was the case, why did you believe that was the person you submitted it to? (EXACTLY AS STATED THROUGHOUT)

A. Because this contract is governed by Service Contract Act of 1965 and they are the only authority that can legally force us to – or to make a determination which party is responsible and how much amount. (EXACTLY AS STATED THROUGHOUT)

Q. Is the Department of Labor the same department that makes a determination of how much you pay?

A. Yes sir.

Q. They make a determination of what fringe benefits you must

* * *

[p. 18] period, normally Government allows you thirty days to phase in, as I testified earlier, this agreement was given to us on March 1st, 1991, effective date being April 1st. This H – page H-1 says in the middle of this thing, phasing period, the phasing period shall be completed at the contract start date and shall not exceed thirty days, so, in effect, Government allows you thirty days for one contract to go in, other to come in, and, of course, in this case, we had to put out everything we could to do it because we were still liable anyway for anything that did not go right under this novation agreement, it took us a few days to transfer this responsibility over to D.C.I. on all four sites. (EXACTLY AS STATED THROUGHOUT)

BY THE COURT:

Let me ask you one other question, were you – did Fidelity Technologies make payment to these employees through November 4?

A. Yes sir.

BY THE COURT:

Were you reimbursed in any fashion by D.C.I.?

A. We were reimbursed by the Government, our Government invoice would go to Government as that being the cut off date. (EXACTLY AS STATED THROUGHOUT)

BY THE COURT:

Very well. You may proceed, counsel, excuse the interruption, I apologize.

Q. That's fine, Your Honor, I just want the facts as well. Now, Mr. Gulati, you testified that you received some instruction from the Department of Labor to pay the vacation benefits to the Fidelity Technologies Corporation employees or plaintiffs, is that correct?

A. Correct, sir.

Q. Okay. Now, isn't it a fact, sir, that the filing of this lawsuit prompted Fidelity Technologies Corporation to go to the Department of Labor and get them to give you some instruction on it? (EXACTLY AS STATED THROUGHOUT)

A. Absolutely, positively not, sir. That is not a fact.

Q. That is not a fact?

A. No sir.

Q. Is it your testimony, sir, – well, strike that. Did Fidelity Technologies Corporation receive these instructions from the Department of Labor within a few days after being served with this lawsuit?

A. That's correct, sir.

Q. And, even though you state you received these instructions within a few days after being served with this lawsuit, is it your testimony that the timing on that is purely happenstance?

A. That's correct, sir.

Q. Purely a coincidence?

A. That's a fact, sir.

Q. Mr. Gulati, do you recall on February 8th, 1996, when you were deposed by me by telephone, testifying to the affect, let me give you a copy of the deposition and I'm looking at page 61. May I approach the witness, Your Honor?

BY THE COURT:

Yes sir.

Q. I'm sorry, 62, the last question. Tell me if I'm reading that question correctly. "Isn't it a fact, sir, that the fact that this lawsuit was served upon you prompted your company to seek to resolve it's dispute with Dynamic Concepts on a more expedient basis?" And, your reply is "Absolutely not, sir." Is that your testimony?

A. That's correct, sir.

Q. Okay. And, on page 63, question, "You're stating that it was pure happenstance that you received a decision from the

* * *

[p. 29] Gerfin, made that statement.

Q. Would you please help me with that name, Mr. Steve . . .

A. Gerfin, G E R F I N, he was Fidelity Technologies representative for (INAUDIBLE).

Q. And, what was Mr. Gerfin told you?

A. I specifically asked Mr. Gerfin what, when or how we would be paid for our vacation time or sick leave time if we had any coming and he said that Fidelity Technologies would take care of that in due course.

Q. Now, at any time, Mr. Savant, before the date that this lawsuit was filed on December 8th of '94, over two years after your termination, did anyone – did Fidelity ever pay you or any of the other plaintiffs one nickel of the owed vacation benefits that were due as of December(sic) 4th of '92?

A. No sir.

Q. At any time before this lawsuit was served on Fidelity Technologies Corporation on December 19th, '94 did Fidelity Technologies Corporation pay you or any of the other plaintiffs one nickel of the accrued vacation benefits that were due back on December(sic) 4th of '92?

A. No sir.

BY MR. MADISON:

For the record we would stipulate that Fidelity Technologies Corporation and no one else paid these people any vacation pay until March of '95. I guess it was. It's not at issue.

BY THE COURT:

Is that acceptable, counsel?

BY MR. TETE:

I wouldn't say – I would agree to stipulate that they didn't tender anything until March of '95, change the word pay to tender.

BY MR. MADISON:

We will accept that modification, Your Honor.

BY THE COURT:

Very well. Move on.

BY MR. TETE:

May I approach the witness, Your Honor?

BY THE COURT:

Yes sir.

Q. Would you please identify the document that I just handed to you, sir?

A. This is a letter to Mr. Dave(sic) Ferguson, U.S. Department of Labor in Alexandria, Louisiana. It's a letter written by the former employees of F.T.C. to Mr. Ferguson asking for support in trying to get our due compensation for our vacation time. And, the letter is signed by all of the employees that had vacation time coming.

Q. And, it makes a reference to an attachment, does it not?

A. The attachment is a letter sent to Senator James David Cain, Senator John Breaux and Congressman Jim McCreary requesting their help in the matter.

Q. Does it also refer to an enclosure, sir?

A. Yes sir, a formal complaint.

Q. Okay. And, is that what is attached?

A. Yes, it is.

BY MR. TETE:

I would like to offer and introduce into evidence as P-2 this letter dated January 6, 1993.

BY MR. MADISON:

This is not a complete document that I have.

BY MR. TETE:

That's all there is.

BY MR. MADISON:

Well, it says continue on the other side, is there supposed to be another side to it?

BY MR. TETE:

I don't have the other side to it.

BY MR. MADISON:

Anyway, I don't have any objection to it.

BY THE COURT:

Very well. Let it be filed.

WHEREUPON, PLAINTIFFS' EXHIBIT NUMBER TWO WAS RECEIVED BY THE CLERK, MARKED AND FILED INTO EVIDENCE AT THIS TIME:

Q. Now, after this – you mailed this letter of January 6, 1993 to Mr. Don Ferguson?

A. Yes sir.

Q. After you mailed this letter to Mr. Don Ferguson did you ever receive any ruling on that?

A. No sir, we didn't receive an answer back from them in no shape or form, I've also called Baton Rouge, the office there and no help on it. (EXACTLY AS STATED THROUGHOUT)

Q. Are you stating you never even received any response?

A. No sir, we did not.

BY MR. TETE:

No further questions.

BY THE COURT:

Cross examination?

BY MR. MADISON:

No question, Your Honor.

BY THE COURT:

You may step down.

BY MR. TETE:

I would call to the stand next Ms. Karen Mahlen.

MS. KAREN MAHLEN, CALLED TO THE STAND, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

* * *

[p. 58] provided for under the Louisiana Statute. The exception filed herein is one that says that under the Services Contract Act these matters are governed and are reposed entirely within the Department of Labor and that this court lacks jurisdiction to apply the Louisiana law to this particular dispute. I note, and, I'm referring particularly to the *Danielsen* case which is reported at 746 F.Supp. 170 and I'm referring particularly to language contained on page 175 of that decision where it's said, the purpose of the SCA, that is the Service Contract Act and I added that, was to ensure that service employees working on Government contracts are not paid wages below the prevailing wages being paid in the locality by non-government contractors. Thus, Section 2 of the Act requires the inclusion of specific provisions establishing minimum wage and fringe benefit levels in contracts entered into by the United States in excess of twenty-five hundred dollars. The principle purpose of which is to furnish services in the United States through the use of service employees. As I consider the facts in this case, I'm of the opinion that the specific purpose of the contract entered into initially by Fidelity was to furnish services in the United States through the use of service employees, that is, employees to operate and service the administrative telephone system owned by the United States Government at Fort Polk. So, I believe to that extent we come within those provisions. The next question arises, is the Services Contract Act limited to wage levels only. The

court is of the opinion that the language indicates that it is not so limited and that it includes fringe benefits and that the payment of vacation time is, in truth and in fact, fringe benefits. We then find that the wage and fringe benefit determination is specifically directed to the responsibility of the Secretary of Labor in accordance with prevailing rates for such employees in the locality. In short, I do not agree with a system that would appear to deprive litigants of a right to access to the courts. Nevertheless, I believe that is precisely what the Congress has attempted to do in this case by according exclusive jurisdiction in the Department of Labor to make these determinations. I do not believe, under those circumstances, that it's appropriate for this court to undertake to make that determination applying the law of the State of Louisiana as opposed to applying the determinations made by the Department of Labor both as to the prevailing rates and fringe benefits which would be due and as to compliance with the obligation imposed to pay the wages and fringe benefits which would be due. I do not necessarily like the decision that I am making, be that as it may, I believe that the exception is good under those circumstances and I'm going to maintain the exception and hold that this court has no jurisdiction to adjudicate this particular matter. Gentlemen, do you understand what I have said? I'm not sure anybody else will.

BY MR. MADISON:

Your Honor, would you like for us to submit a judgment?

BY THE COURT:

Please.

BY MR. MADISON:

Yes sir, we will do that.

BY MR. TETE:

Thank you, Your Honor

****END OF PROCEEDING****

U.S DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
WASHINGTON, D.C. 20210

REGISTER OF WAGE DETERMINATIONS
UNDER THE SERVICE CONTRACT ACT
Hourly Direction of the Secretary of Labor

/s/ Alan L. Moss
Alan L. Moss
Director

Division of
Wage Determinations

LOCALITY
State: Louisiana
Area: LA COUNTIES: . ERNON

Wage Determination No.: 84-0621 (Rev. 4)
Date: 11/19/1990

Class of Service Employees	Minimum Hourly Wage
Employed on contracts for the operation and maintenance of administrative telephone system in the above LOCALITY:	
1. Switchboard Operator	$ 6.48
2. Telephone Mechanic	$ 12.72
3. Cable Splicer	$ 12.72
4. Lineman	$ 12.72

Fringe Benefit Payments

Health & Welfare	Vacation	Holiday	Other

Fringe benefits applicable to all classes of service employees engaged in contract performance: 1/ 2/ 3/

HEALTH & WELFARE: Life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans: Employer contributions costing an average of $1.84 per hour computed on the basis of all hours worked by service employees employed on the contract. (See 29 CFR 4.175(b))

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 10 years of service. Length of service includes the whole span of continuous service with the present (successor) contractor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 4.173)

HOLIDAYS: 10 paid holidays per year: New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.)